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ARTICLE

CORPORATE CITIZENSHIP: GOAL OR FEAR?

KENT GREENFIELD*

The conference that engendered this volume prompted a number of scholars of corporate law to think carefully and deeply about the history of corporate responsibility and about a range of current topics that occupy the attention of academics and regulators. In these discussions with fellow academics, I found myself wondering about how our current moment will be perceived in the future. When fifty or one hundred years from now our intellectual descendants look back on the conference that took place at the University of St. Thomas in 2013, how will the current moment be analyzed? What trends are we experiencing now that future scholars will feel are worth studying and critiquing? This essay is merely a pondering of that question—offered as a prompt to others and an invitation to my colleagues to think through these matters with me.

My central assumption is that our current moment—like the history of corporate responsibility and indeed all of corporate law to this point—can only be understood within the context of broader intellectual and ideological trends. It is not coincidental, for example, that the Gilded Age of the late nineteenth century and early twentieth century saw an emphasis on the private nature of corporations as a rule of decision in both corporate law (see *Dodge v. Ford*)¹ and constitutional law (see *Lochner v. New York*).² Similarly, it was not happenstance that the Great Depression brought about a

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1. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

2. *Lochner v. New York*, 198 U.S. 45 (1905) (striking down regulations based on the Due Process Clause); *see also* *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down regulations based on the Commerce Clause).

fundamental rethinking of not only the nature of corporations,³ but also of the place of the market itself⁴ and the role of government in regulating it.⁵

Presently, we are experiencing a churning in the intellectual history of corporate law theory and doctrine. There is now more openness to revisiting the core questions about what corporations are, to whom they owe obligations, and how best to conceptualize them and their regulation than at any time in a generation. This moment has been brought about because of the increasing skepticism the public is showing toward corporations and the people who manage them. The skepticism springs from a number of shocks in the economic, environmental, and political fields that have revealed the risks of unbridled corporate power, short-termism, managerial opportunism, and Wall Street supremacy.

But this intellectual churning is not limited to the corporate law field. The United States is also experiencing, in my view, the broadest debate since the New Deal about the role of corporations in society and politics. The spark for this debate was the 2010 decision of the Supreme Court in *Citizens United v. Federal Election Commission*,⁶ which validated the constitutional rights of corporations to engage in political discourse and to spend money from general treasury funds to influence electoral outcomes. In some ways, the decision embodied the conventional wisdom about corporations during the last few decades—namely that they are private institutions best analogized to persons. The harshly negative reaction to the decision, however, embodies the Zeitgeist of the current skepticism toward corporations.

The interplay between these two trends—a questioning of the nature and role of corporations in both the private and public spheres—may turn out to be the defining characteristic of our current historical moment. It is yet unclear, however, whether this questioning will result in any fundamental changes in corporate law and doctrine, constitutional law, or social and political theory.

An irony exists in this concurrence of questioning in both the public and private spheres. On the corporate law (private) side,⁷ the trend is to

3. See ADOLF A. BERLE JR. AND GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

4. See Robert Lee Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

5. See Securities Act of 1933 §§ 1–26, 15 U.S.C. §§ 77a–77bbbb (2006); Securities Exchange Act of 1934 §§ 1–37, 15 U.S.C. §§ 78a–78nn (2006); National Labor Relations Act of 1935, 49 Stat. 449 (1935), 29 U.S.C. § 151 (1935 & Supp. 1937) (protecting the right to bargain collectively); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (1982) (creating a federal minimum wage).

6. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

7. Before I go too far, I must admit that I appear to be succumbing to the false private/public dichotomy that I have previously railed against. See KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* 40–71 (2006) (arguing

challenge the corporation to broaden its role in society and enlarge the obligations it owes beyond the mere pecuniary. There is a growing skepticism toward shareholder primacy and increasing trends to call on corporations to recognize and act on the interests of all of its stakeholders. The critics of corporations are, in effect, calling on corporations to act as if they were players not only in the private sphere but also in the public one as well—to act, one might say, as citizens. This call on corporations to act as “good corporate citizens” has resonance and meaning.⁸

Meanwhile, on the constitutional law (public) side, the trend is to challenge the corporation to stay within a narrow economic sphere and to focus on the pecuniary implications of its activities. Corporate activity in politics and the public sphere is viewed skeptically. The current effort to amend the constitution to take away corporate “personhood” intends to take away constitutional rights from all incorporated entities. The thought of corporations acting as “citizens”—whether for progressive ends or not—is seen as nonsensical at best, and destructive to democracy at worst.⁹

It has gone unnoticed until now that the work of the pro-corporate citizenship activists often directly conflict with the work of the anti-corporate personhood activists, and vice versa. The arguments of “progressive” corporate law scholars advocating for expanded corporate duties are now being used to further the arguments of those wishing to expand corporations’ constitutional rights. The arguments of those opposing corporate constitutional rights contradict and undermine the efforts of those who call on corporations to take a more active role in society, which would protect the interests of all corporate stakeholders. This tension is not between ends of the ideological spectrum; it is primarily a tension between different components of the ideological left. This essay explores how these two positions are ultimately at odds with one another, despite their common critique of corporate law.

that corporate law should be seen as public law). But my criticism of this taxonomy in the past has been of the notion that doctrinal implications should flow from the distinction. Here, I am using the dichotomy only as a descriptive; my only sin is to further hackneyed and questionable categories. A sin, yes. A mortal sin, no.

8. Indeed, some of the leading institutions in the field of corporate responsibility use “citizenship” to embody their objective. See BOSTON COLL.’S CTR. FOR CORP. CITIZENSHIP, <http://www.bcccc.net> (last visited Oct. 5, 2013); CORPORATE CITIZENSHIP, <http://www.corporate-citizenship.com> (last visited Oct. 5, 2013).

9. See MOVE TO AMEND, <https://movetoamend.org> (last visited Mar. 3, 2014) (cataloging a broad movement to amend the Constitution to remove any constitutional protections for corporations); JEFF CLEMENTS, CORPORATIONS ARE NOT PEOPLE: WHY THEY HAVE MORE RIGHTS THAN YOU DO AND WHAT YOU CAN DO ABOUT IT (2012).

I. CORPORATE CITIZENSHIP AS GOAL

For some time, “corporate citizenship” has been used as a synonym of “corporate responsibility.”¹⁰ Corporations have corporate citizenship departments and corporate citizenship reports.¹¹ To be sure, no corporation is saying that it is actually a citizen. Instead, the term indicates that the corporation has obligations that extend beyond the financial—that a corporation can and should be measured not only by its bottom line, but also by its behavior toward a broad group of stakeholders and society generally. In this sense, corporate “citizenship” stands in contrast to “shareholder primacy,” the notion that shareholder interests are the sum total by which corporations should be measured.

Following the global financial crisis of 2008, shareholder primacy has come under increasing attack. An article in the Harvard Business Review recently proclaimed that “[t]here’s a growing body of evidence . . . that the companies that are most successful at maximizing shareholder value over time are those that aim toward goals other than maximizing shareholder value. Employees and customers often know more about and have more of a long-term commitment to a company than shareholders do.”¹² A popular non-business essayist in the New York Times wrote that “it feels as if we are at the dawn of a new movement—one aimed at overturning the hegemony of shareholder value.”¹³ An essayist in Forbes, hardly a bastion of European socialism, called shareholder primacy “the dumbest idea in the world.”¹⁴ The Atlantic ran an essay arguing that “shareholders are ruining American business.”¹⁵ The senior managing director of the U.S. investment firm Blackstone Group has said that the German practice of including employee representatives on the supervisory board of German corporations

10. See generally CORPORATE CITIZENSHIP AND NEW GOVERNANCE: THE POLITICAL ROLE OF CORPORATIONS (Ingo Pies & Peter Koslowski eds., 2011); BRADLEY K. GOOGINS ET AL., BEYOND GOOD COMPANY: NEXT GENERATION CORPORATE CITIZENSHIP (2007); ANDREW CRANE & DIRK MATTEN, BUSINESS ETHICS: MANAGING CORPORATE CITIZENSHIP AND SUSTAINABILITY IN THE AGE OF GLOBALIZATION (Oxford Univ. Press 3d ed. 2010); HANDBOOK OF RESEARCH ON GLOBAL CORPORATE CITIZENSHIP (Andreas Georg Scherer & Guido Palazzo eds., 2008).

11. See *Corporate Citizenship*, BOEING, <http://www.boeing.com/boeing/companyoffices/aboutus/community/index.page> (last visited Oct. 5, 2013); *Corporate Citizenship*, MICROSOFT, <http://www.microsoft.com/about/corporatecitizenship/en-us/> (last visited Oct. 5, 2013); *Disney Citizenship*, THE WALT DISNEY COMPANY, <http://thewaltdisneycompany.com/citizenship> (last visited Oct. 5, 2013).

12. Justin Fox & Jay W. Lorsch, *What Good Are Shareholders?*, HARV. BUS. REV., Jul.–Aug. 2012, at 50, 57.

13. Joe Nocera, *Down with Shareholder Value*, N.Y. TIMES, Aug. 11, 2010, at A.19; see also LYNN STOUT, THE SHAREHOLDER VALUE MYTH (2012).

14. Steven Denning, *The Dumbest Idea in the World: Maximizing Shareholder Value*, FORBES (Nov. 28, 2011, 1:19 PM), <http://www.forbes.com/sites/stevedenning/2011/11/28/maximizing-shareholder-value-the-dumbest-idea-in-the-world/>.

15. Justin Fox, *How Shareholders Are Ruining American Business*, THE ATLANTIC (June 19, 2013, 10:05 PM), <http://www.theatlantic.com/magazine/archive/2013/07/stop-spoiling-the-shareholders/309381/>.

was one of the factors that allowed Germany to avoid the worst of the financial crisis.¹⁶

I have written elsewhere that corporate law and doctrine should take advantage of this moment to advance efforts to broaden the responsibilities of corporations to include the interests of employees and other stakeholders.¹⁷ Of course, the mechanism of how such an advancement could occur is unclear at best, especially given the current hegemony of Delaware in providing the corporate law of the United States.¹⁸ Having said that, there are at least two recent occurrences that merit attention in this context, both of which represent efforts to broaden corporate responsibility.

A. *Ultra Vires as Mechanism to Enforce Law*

The first is the current shareholder plaintiff suit against Hershey Corporation based on allegations that the company is illegally using child labor in its cocoa production efforts in western Africa.¹⁹ In itself, the case may seem underwhelming. The suit merely asks the Delaware Court of Chancery to allow the shareholders to inspect some of the corporation's books and records that would be relevant in the shareholders' investigation of the allegations.²⁰ But the underlying theory of the case represents an innovation that could have broader impacts beyond Hershey.

In an increasingly global world economy, corporations are involving themselves more deeply in the laws and cultures of other national economies. Also, because of the nature of the global economy, an increasing number of companies are working through subcontractors, suppliers, and

16. ALINE CONCHON, BOARD-LEVEL EMPLOYEE REPRESENTATION RIGHTS IN EUROPE: FACTS AND TRENDS 7–8 (2011), available at <http://www.etui.org/Publications2/Reports/Board-level-employee-representation-rights-in-Europe>; see also MAP: Board-Level Representation in the European Economic Area, WORKER-PARTICIPATION.EU, <http://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Board-level-Representation2/MAP-Board-level-representation-in-the-European-Economic-Area2> (last visited Sept. 27, 2013).

17. See Kent Greenfield, *The Third Way*, 37 SEATTLE U.L. REV. 749 (2014).

18. See GREENFIELD, *supra* note 7, at 107–22.

19. La. Mun. Police Emp. Ret. Sys. v. Hershey Co., C.A. No. 7996-ML (2013). The author filed an amicus brief in the case, along with Professor Nancy Gertner; see Amended Brief of Professor Nancy Gertner and Professor Kent Greenfield, as Amici Curiae in Support of Plaintiff; see also *Harvard Professors Tell Court Hershey Should Turn Over Child-Labor Records*, TELEGRAM (Apr. 12, 2013), <http://www.telegram.com/article/20130412/NEWS/304128575/1002/business>; Phil Milford & Dawn McCarty, *Hershey Should Supply Child-Labor Records*, *Academics Say*, BLOOMBERG (Apr. 12, 2013), <http://www.bloomberg.com/news/2013-04-12/hershey-should-supply-child-labor-records-academics-say.html>. On March 19, 2014, the Vice Chancellor denied Hershey's motion to dismiss the case. See Jef Feeley, *Hershey Investors Suing Over Child Labor Allowed to Produce Files*, BLOOMBERG BUSINESSWEEK, (Mar. 19, 2014), <http://www.businessweek.com/news/2014-03-18/hershey-judge-says-shareholders-can-look-for-child-labor-files-1>. The Court has not, at the time of this writing, issued a final ruling.

20. The demand is pursuant to Inspection of Books and Records, Del. Code Ann. tit. 8, § 220 (West 2010) (“Any stockholder . . . shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from . . . [t]he corporation's . . . books and records . . .”).

middlemen to occupy stages of their production and supply chains that would have traditionally been occupied by the company itself or by wholly-owned subsidiaries.

One difficulty that this situation poses is how to hold corporations accountable for illegalities committed overseas by their agents or business partners. The problem has been recognized for some time—the most prominent examples being the suits brought under the Alien Tort Claims Act against Unocal Corporation for alleged violations of human rights in Burma more than a decade ago,²¹ and more recently against Royal Dutch Shell for alleged involvement in human rights violations in Nigeria.²² But in neither of these cases was the corporation held accountable and indeed the jurisdictional and doctrinal obstacles for liability are severe.

The suit against Hershey, however, is based on a different theory, one that creates a mechanism within corporate law that operationalizes duties to obey the law. The argument, first articulated over a decade ago,²³ is that corporations are empowered by their charters and state law only for “lawful” purposes and activities. Any unlawful activity, therefore, is “ultra vires,” or beyond the power of the corporation. Thus any shareholder may sue in the chartering jurisdiction to enjoin the unlawful activity, even if such activity is alleged to be taking place overseas. Hershey is the first company to be sued on the basis of this theory.

This theory could be very powerful since the duty to obey the law is an area of Delaware law that is enforced only rarely, and that focuses on the behavior of individuals within the company rather than the company itself. It is now quite difficult to prove that individual directors should be subject to personal liability for a failure to monitor.²⁴ Nevertheless, if successful this ultra vires theory will empower shareholders to protect their legitimate interest in monitoring whether the corporation is acting unlawfully, even when they are unable to show any individual director acted in breach of her duties.

Also, this theory will allow shareholders, in effect, to import international law and the law of foreign jurisdictions where the companies do business into the domestic law of corporations. Corporations committing illegal acts in jurisdictions that are unwilling or unable to enforce their own laws against the companies will nevertheless be subject to shareholder action in

21. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *reh'g en banc*, 403 F.3d 708 (9th Cir. 2005).

22. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

23. See Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279 (2001).

24. See *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996) (business judgment rule applies to managerial decision as to extent of monitoring systems put in place); *Stone v. Ritter*, 911 A.2d 362 (Del. Ch. 2006) (managerial liability only for “utter failure” to act in good faith).

state courts in the United States. The difficulty, of course, is that information about alleged illegalities will be hard to come by. Thus, the result in the Hershey books and records case will be worth watching.

B. *Benefit Corporations*

Another innovation worth watching is the advent of “benefit corporations,” a new type of business classification that is increasingly popular around the country. Benefit corporations are for-profit corporations that are also required to create “a material positive impact on society and the environment and to meet higher standards of accountability and transparency.”²⁵ At the time of this writing, nineteen states—including Massachusetts, Rhode Island, and Vermont—as well as Washington D.C. have adopted legislation allowing corporations to opt in to the benefit corporation framework of obligations.²⁶ Even Delaware, the most popular state for business incorporations, recently adopted a benefit corporation statute.²⁷

The supporters of benefit corporations argue that the framework will liberate businesses from the market demands of Wall Street and the legal demands of shareholder plaintiffs seeking to hold management accountable for decisions that fail to put shareholder interests first.²⁸ They also say that companies choosing the benefit corporation status can brand themselves as green and society-minded. For example, Patagonia recently opted in to benefit corporation status—a good test for this branding strategy.²⁹ Also, the advocates say benefit corporations will be able to prove that a focus on more than shareholder return can have long-term benefits, which will not only benefit the full range of a corporation’s stakeholders, but also the corporation itself.³⁰

25. THE BENEFIT CORP INFORMATION CENTER, www.benefitcorp.net (last visited Oct. 5, 2013).

26. *State by State Legislative Status*, BENEFIT CORP., <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited Feb. 22, 2014).

27. S.B. 47, 147th Gen. Assemb. (Del. 2013).

28. For a comprehensive description of the putative advantages of benefit corporations given existing legal fiduciary obligations, see William H. Clark, Jr., et al., *White Paper: The Need and Rationale for the Benefit Corporation: Why It is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public*, BENEFIT CORP., http://benefitcorp.net/storage/documents/Benefit_Corporation_White_Paper_1_18_2013.pdf (last visited Feb. 22, 2014).

29. John Tozzi, *Patagonia Road Tests New Sustainability Legal Status*, BLOOMBERG NEWS (Jan. 4, 2012), <http://www.bloomberg.com/news/2012-01-04/patagonia-road-tests-new-sustainability-legal-status.html>.

30. *Why B Corps Matter*, <http://www.bcorporation.net/what-are-b-corps/why-b-corps-matter> (“Business, the most powerful man-made force on the planet, must create value for society, not just shareholders.”); Shelly Alcorn & Mark Alcorn, *Benefit Corporations: A New Formula for Social Change*, ASSOCIATIONS NOW, June 2012, <http://www.asaecenter.org/Resources/ANowDetail.cfm?ItemNumber=179687> (“There is a strong case to be made for becoming a benefit corporation to gain a competitive advantage and attract investors . . .”) (last visited Feb. 22, 2014).

I must admit some skepticism however about the advantages of benefit corporations, for several reasons. First, they are voluntary. Once corporations opt in to the framework, certain requirements attach. But because the decision to opt in is voluntary, the corporations that most need the strictures of the framework are the least likely to choose it. Likewise, those that do opt in could have behaved positively without the legal protection of the benefit corporation status. Under the “business judgment rule” courts will only set aside the decisions of management—of any company—if they are tainted with self-interest or, more rarely, if management is grossly misinformed before acting. So, under current law, if a board wants to support charitable causes, pay employees more, or voluntarily reduce pollutive emissions, there is no doubt that they can do so without fearing legal recourse. The problem, under current law, is not that management is prohibited from acting with an eye toward society. The problem is that they are not required to do so. Benefit corporation statutes do not solve this problem.

Second, these statutes do not protect companies from market pressure. Because not all companies will choose to become benefit corporations, those that do will suffer competitive disadvantage in the capital market, at least in the short term. Some shareholders may accept the lower returns implicit in the benefit corporation framework, but most will not. Thus, the cost of capital will be higher for benefit corporations than for their non-benefit competitors. The problem with this is that over time, a focus on values other than shareholder profit will appear, in some cases at least, to be hurtful to a company’s fortunes. The way to make sure attentiveness to social needs will not hurt a company is to level the playing field—i.e., to mandate such attentiveness by all corporations. This, of course, is not what benefit corporation statutes do.

Third, these statutes might embolden other companies to act poorly. Advocates of benefit corporations say that without such a framework companies might be punished for doing the right thing. Although I think that is a misreading of the law, a lot of people believe it. The push for benefit corporation statutes will strengthen this misconception. The result may be that companies that do not choose to become benefit corporations—that is, most of them—will be able to say to shareholders, consumers, and community activists that they should take their concerns elsewhere. In a way, a company’s decision to not choose benefit corporation status will amount to a branding strategy as well, but the opposite of what the benefit corporation stands for. Wall Street will love it and managers of those companies will be encouraged to act even worse than they do now.

In my view, the main question with regard to benefit corporation statutes is whether the push for their enactment in so many states in such a short time is either a reflection of a greater willingness by state legislatures to consider fundamental changes to the way corporations are conceptualized, or is actually a distraction from other more fundamental changes. If

the former, then these statutes may be a precursor of things to come. If the latter, then an emphasis on benefit corporations will take the air out of the reform balloon.

In any event, the efforts by the advocates of benefit corporations show one thing as a matter of certainty—many thousands of Americans, mostly on the ideological left, want corporations to act with a broad view of their responsibilities to society. That is, they want them to act more like citizens.

II. CORPORATE CITIZENSHIP AS FEAR

Meanwhile, many thousands of Americans, mostly on the ideological left, are increasingly calling on corporations to stay within their economic sphere. To these Americans, the thought of corporations being citizens—good citizens or not—is anathema.

The impetus for this fear of corporate citizenship, of course, was *Citizens United*. The response to the opinion was massive and almost universally negative. Soon after the decision, as much as eighty percent of Americans thought it was a mistake,³¹ and President Obama faced down members of the Court at the State of the Union address, accusing them of judicial activism.³² In the years following the decision, opposition to the decision has remained high,³³ and a movement to amend the Constitution to overturn the decision is gaining serious traction. As of this writing, sixteen states, nearly five hundred localities, twenty-seven U.S. Senators, ninety-eight U.S. Representatives, and the President have endorsed an amendment of some kind.³⁴

The proposed constitutional amendments come in various forms,³⁵ but several of the most prominent proposals go beyond overturning *Citizens*

31. Gary Langer, *In Supreme Court Ruling on Campaign Finance, the Public Dissents*, ABC NEWS (Feb. 17, 2010, 7:00 AM), <http://abcnews.go.com/blogs/politics/2010/02/in-supreme-court-ruling-on-campaign-finance-the-public-dissents/>; Dan Eggen, *Poll: Large Majority Opposes Supreme Court's Decision on Campaign Financing*, WASH. POST (Feb. 16, 2010), http://articles.washingtonpost.com/2010-02-16/politics/36773318_1_corporations-unions-new-limits.

32. See Jesse Lee, *President Obama on Citizens United: "Imagine the Power This Will Give Special Interests over Politicians"*, THE WHITE HOUSE BLOG (July 26, 2010, 3:07 PM), <http://www.whitehouse.gov/blog/2010/07/26/president-obama-citizens-united-imagine-power-will-give-special-interests-over-polit>.

33. A 2012 poll put the level of opposition at sixty-two percent. Andrew Joseph, *Poll: Most Voters Oppose Citizens United Decision*, NATIONAL JOURNAL (Jan. 20, 2012), <http://www.nationaljournal.com/blogs/influencealley/2012/01/poll-most-voters-oppose-citizens-united-decision-20>.

34. Lindsay Van Dyke, *Support for Amending the Constitution to Overturn Citizens United is One-Third of the Way There!*, FREE SPEECH FOR PEOPLE (Sept. 24, 2013, 7:51 AM), <http://www.freespeechforpeople.com/node/601>.

35. Some proposed amendments are fairly specific and narrow. The so-called Udall amendment, for example, would simply authorize Congress to enact reasonable campaign finance laws. See S.J. Res. 19, 113th Cong. (2013). Others are broader, with the broadest purporting to end constitutional rights for all entities not "natural persons." See S.J. Res. 11, 113th Cong. (2013). For a comparison of the bills currently being considered by Congress, see *A Comparison of Constitutional Amendment Bills Responding to Citizens United in the 113th Congress, as of August*,

United to make it clear that no corporation would receive any constitutional rights at all. For example, the amendment proposed by the group Free Speech for People, introduced in Congress by Representative Jim McGovern of Massachusetts, states that constitutional protections are intended only for “natural persons.”³⁶ These amendments are part and parcel of a larger attack on corporate involvement not only in politics but in society broadly.³⁷ To these activists, a central problem in U.S. politics is the “personhood” of corporations.

While this movement begins with a deep skepticism of corporate power, the urge is exactly opposite to the urge within the corporate responsibility movement. For the anti-personhood activists, the remedy is to keep corporations within a narrow purview; for the corporate citizenship activists, the remedy is to ask the corporation to acknowledge and accept a broader range of obligations.

I have been critical of the amendment movement on several grounds.³⁸ Most crucially, I think the movement overstates the importance of “personhood” in constitutional law and understates the importance of corporations asserting constitutional rights, at least in some situations. Corporations are not people, to be sure, but neither are unions, churches, Planned Parenthood, the NAACP, Boston College, Random House, MSNBC, or The New York Times. Under the amendment proposed by Congressman McGovern, all of these groups would lose their constitutional rights.

Also, it is worth emphasizing that more than free speech rights would be lost. Organizations, such as those listed above, would also lose rights to

2013, FREE SPEECH FOR PEOPLE (last visited Oct. 5, 2013), <http://freespeechforpeople.org/sites/default/files/FSFP%20analysis%20of%20Citizens%20United%20amendments%20-%20August%202013.pdf>.

36. H.J. Res. 21, 113th Cong. (2013).

37. See, e.g., JEFFREY D. CLEMENTS, CORPORATIONS ARE NOT PEOPLE 13 (2012) (“Most Americans understand the fundamental truth that corporations are not people and that large corporations already have far too much power in America.”); *Bill Moyers and Stephen Colbert Talk Corporations, Racism*, THE HUFFINGTON POST (Jan. 11, 2012, 12:40 PM), http://www.huffingtonpost.com/2012/01/11/bill-moyers-stephen-colbert-corporations_n_1199503.html (quoting Moyers as saying: “You cannot have a peoples’ democracy as long as corporations are considered people.”); Jamie Raskin, *Corporations Aren’t People*, NPR (Sept. 10, 2009, 12:22 PM), <http://www.npr.org/templates/story/story.php?storyId=112714052> (“The sovereign actors of American democracy—we, the people—have also understood that business corporations, which are magnificent agents of capital accumulation and wealth maximization in the economic sphere, pose extreme dangers in the political sphere. Our best leaders have wanted business to prosper but never to govern.”).

38. See Kent Greenfield, *The Stakeholder Strategy*, 26 DEMOCRACY: A JOURNAL OF IDEAS 47 (2012); Kent Greenfield, *A New Strategy to Fight Citizens United*, THE HUFFINGTON POST (Sept. 14, 2012, 6:11 PM), http://www.huffingtonpost.com/kent-greenfield/a-new-strategy-to-fight-c_b_1882744.html; Kent Greenfield, *Why Progressives Should Oppose A Constitutional Amendment to End Corporate “Personhood”*, THE HUFFINGTON POST (Jan. 26, 2012, 5:22 PM), http://www.huffingtonpost.com/kent-greenfield/why-progressives-should-o_b_1231884.html; Kent Greenfield, *How to Make the Citizens United Decision Even Worse*, WASH. POST (Jan. 19, 2012), http://www.washingtonpost.com/opinions/citizens-united-a-supreme-court-decision-that-is-widely-misunderstood/2012/01/18/gIQAwa3nBQ_story.html.

be free from warrantless searches, the seizure of property without due process or compensation, and the right to jury trials. Congress could pass a law saying that The New York Times could not pay their reporters, or that the University of St. Thomas could not teach a course on Islamic law. Perhaps Planned Parenthood could be raided without a warrant.

I also think that stakeholder theory itself offers the best potential remedy to the harms of *Citizens United*. The key flaw of American corporations is that they have become a vehicle for the voices and interests of an exceedingly small managerial and financial elite—the notorious one percent. The fact that corporations speak is less of a concern than whom they speak for and what they say. The cure for this is more democracy within businesses—more participation in corporate governance by workers, communities, shareholders, and consumers. If corporations were themselves more democratic, their participation in the nation’s political debate would be of little concern.

This is not to say that I support the decision or reasoning in *Citizens United*. On the contrary, the decision was ham-fisted in applying First Amendment doctrine, activist in reaching out to decide questions not necessary to the case, and ignorant of the realities of corporate governance. But one does not burn down a house to rid it of termites.

Yet all of this is beside my point in this essay. Here, I want instead to focus on a descriptive point: the work of activists on the corporate citizenship front conflicts with the work of the anti-personhood activists, and vice versa. The core tenets of the progressive corporate law movement include the principles that shareholders are not supreme and that corporations should be measured by more than economic measures.³⁹ For anti-corporate personhood activists, two arguments often cited for limiting corporate rights are that the shareholder owners should be protected from managerial misuse of their funds,⁴⁰ and that corporations should not engage politically because they have only economic natures.⁴¹

One example comes from a debate I once had with John Bonifaz, who is one of the amendment movement’s most capable leaders. The debate was televised by WGBH here in Boston, and I pointed out that WGBH itself is a corporation and that its programming ought to receive free speech protection.⁴² Under Bonifaz’s proposed amendment, WGBH would lose the protection of the First Amendment and indeed all other constitutional

39. See generally GREENFIELD, *supra* note 7.

40. Elizabeth Kennedy, *Protecting Shareholders after Citizens United*, BRENNAN CENTER FOR JUSTICE (July 13, 2011), <http://www.brennancenter.org/blog/protecting-shareholders-after-citizens-united> (“When shareholders’ invested money is spent on politics, millions of Americans are stuck unknowingly contributing to political causes they may not themselves support.”).

41. See *infra* notes 45–48 (discussing dissent of John Paul Stevens in *Citizens United*).

42. *Greenfield Talks to WGBH on Citizens United*, BOSTON COLLEGE LAW SCHOOL (May 31, 2012), http://www.bc.edu/content/bc/schools/law/fac-staff/facultynews/2012/greenfield_wgbh_citizensunited.html.

guarantees. Even Google, I suggested, should be able to demand that FBI agents have a warrant before they search the contents of the company's servers.⁴³ Bonifaz countered by asserting that, in the latter case, the shareholders of Google—the company's owners—could sue.⁴⁴ His statement revealed the underlying assumption of corporations as private property owned by shareholders and used for their benefit. This is simply an assertion of the shareholder primacy norm, which many progressive corporate law theorists, including me, have been questioning for decades.

Bonifaz's offhand statement would not be worth remarking on if it were unique. But opponents of corporate rights often point to the ownership status of shareholders and to their economic mandate of corporations to bolster the argument that corporations should not be engaging in political discourse or spending the shareholders' money. Indeed, in *Citizens United* itself, Justice John Paul Stevens penned the lead dissent and argued, among other things, that corporate speech should be limited in order to protect shareholders' investments. Shareholders are seen as owners, as "those who pay for an electioneering communication"⁴⁵ and are assumed to have "invested in the business corporation for purely economic reasons"⁴⁶ Moreover, Stevens argued that corporate political speech did not merit protection because:

[T]he structure of a business corporation . . . draws a line between the corporation's economic interests and the political preferences of the individuals associated with the corporation; the corporation must engage the electoral process with the aim to enhance the profitability of the company, no matter how persuasive the arguments for a broader . . . set of priorities.⁴⁷

Stevens even goes on to quote the controversial ALI Principles of Corporate Governance, saying that "a corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."⁴⁸ It is as if the opponents of *Citizens United* are so certain of the dangers of corporate political activity that they are ready to throw stakeholder theory under the bus.

Of course the difficulties run the other way as well. The best current example of how stakeholder theory is being used to broaden corporations' constitutional prerogatives is in the context of the recent suits brought by certain corporations to challenge the portion of the Affordable Care Act that mandates employers to provide employee health insurance that includes

43. *Id.*

44. *Id.*

45. *Citizens United*, 558 U.S. at 475 (Stevens, J., dissenting).

46. *Id.* at 476 (quoting Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133, 201 (1998)).

47. *Id.* at 470 (emphasis added) (internal quotations omitted).

48. *Id.* (quoting ALI, Principles of Corporate Governance: Analysis and Recommendations sec. 2.01(a), 55 (1992)).

contraceptive care.⁴⁹ As many as sixty suits are now pending across the country, and two—one from the Tenth Circuit and one from the Third Circuit⁵⁰—have already been granted certiorari by the Supreme Court and will be decided in a matter of months. These cases turn on the question of whether corporations may assert religion-based conscientious objections to the contraceptive mandate. That question depends in part on whether the corporations can have purposes and obligations that extend beyond their economic interests.

The irony in these cases is that the corporations asserting the ideologically conservative argument that they should be free from government regulation are using arguments often made by progressive stakeholder theorists.⁵¹ The opponents of the corporations' arguments, like in the *Citizens United* context, contend that corporations should be held to economic purposes only. For example, in the Tenth Circuit decision upholding the corporation's right to be exempted from the mandate, the court noted the existence of benefit corporations as an example of the phenomenon that corporations need not always be limited to solely economic purposes.⁵² A concurring judge, like Stevens, used the ALI Principles as a source of insight, but depended on a different reading:

But no law requires a strict focus on the bottom line, and it is not uncommon for corporate executives to insist that corporations can and should advance values beyond the balance sheet and income statement. See ALI Principles of Corporate Governance: Analysis and Recommendations § 2.01(b) (2012) ("Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business: . . . (2) May take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and (3) May devote a reasonable amount of resources to public welfare, humanitarian, educational and philanthropic purposes.")⁵³

Meanwhile, the Third Circuit held against the corporation, reasoning that an entity "created to make money could [not] exercise such an inherently 'human' right."⁵⁴ A dissenter, however, also used the existence of benefit corporations to bolster his point:

It is commonplace for corporations to have mission statements and credos that go beyond profit maximization. When people

49. *Birth Control and a Boss's Religious Views*, N.Y. TIMES, Sept. 30, 2013, at A.24; Lyle Denniston, *U.S., Business Appeal on Birth-Control Mandate*, SCOTUSBLOG (Sept. 19, 2013, 2:29 PM), <http://www.scotusblog.com/2013/09/birth-control-mandate-issue-reaches-court/>.

50. *Conestoga Wood Specialties v. Sec'y of the U.S. Dep't of Health & Human Serv.*, 724 F.3d 377 (3d Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).

51. *Conestoga*, 724 F.3d at 381–83; *Hobby Lobby*, 723 F.3d at 1120.

52. *Hobby Lobby*, 723 F.3d at 1135 n.10.

53. *Id.* at 1147 (Hartz, J., concurring).

54. *Conestoga*, 724 F.3d at 385.

speak of “good corporate citizens” they are typically referring to community support and involvement, among other things. Beyond that, recent developments in corporate law regarding “Benefit” or “B” corporations significantly undermine the narrow view that all for-profit corporations are concerned with profit maximization alone.⁵⁵

The efforts of anti-personhood activists are not only in tension with stakeholder theory on the conceptual level. In the political arena too, a tension exists if only because the potential for reform is a finite resource. If we are indeed in a moment of potential for questioning the very framework of how we view corporations and their obligations, we might make headway on changing the obligations of corporations within corporate governance law, or we might make headway by challenging their role in politics. It is difficult to imagine that we could do both. This is especially true, of course, when the arguments of one conflict with the other.

III. CONCLUSION

We are in the midst of a moment of real possibility of rethinking the nature of the corporation. What are the purposes of corporations? To whom do they owe obligations? Do they maximize their social value by focusing on economic ends only, or should they be charged with broader social and political obligations?

This essay discussed two ideas of how corporate power could be harnessed and constrained, specifically the use of ultra vires suits to enforce laws otherwise left under-enforced and the creation of benefit corporations empowered to pursue social goals. These are only two ideas among a host of other ideas advanced by progressive critics of corporate power.

One very real obstacle to the achievement of these or other initiatives is the disagreement within the ideological left about corporate citizenship. Some critics of corporate power have long argued that corporations should be charged with broader social goals, which could be seen as asking corporations to behave like good citizens. Other critics want corporations to stay within a narrow economic sphere to protect the social and political sphere from their influence.

This disagreement is more than merely theoretical. It embodies a fundamental disagreement among those most engaged in the project of questioning corporate power, and because of this disagreement the remedies proposed by the two camps often conflict. Unfortunately, this tension has to date been elided rather than explored.

55. *Id.* at 403 n.18 (Jordan, J., dissenting).